UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN RE: DEPOSITION NOTICE OF JAMES E. FISCHER,	)	Cause No. 4:17mc-00202
Petitioner.	)	

MOTION TO QUASH NOTICE TO TAKE DEPOSITION OF JAMES E. FISCHER

COMES NOW petitioner, James E. Fischer, by and through his undersigned attorneys, Fox Galvin, LLC, and moves the Court, pursuant to FRCP 45(d)(3)(a), to quash the Amended Notice to Take the Deposition of James E. Fischer. In support of said Motion, petitioner states as follows:

Jurisdictional Statement

1. In this matter James E. Fischer, an attorney practicing in Clayton, Missouri, is asking this Court to quash a deposition that has been noticed for Monday, April 17, 2017, at the Law Office of Fox Galvin, LLC, One South Memorial Drive, 12th Floor, St. Louis, Missouri 63102. See, Amended Notice to Take Deposition attached as **EXHIBIT A**.

2. The deposition subpoena in question has been issued with respect to a wrongful death action currently pending in the United States District Court Eastern District of Arkansas, Jonesboro Division. The matter numbers is: 3:15-cv-00350-JLH.

3. It is believed that Mr. Fischer is being called to provide testimony regarding his prior legal representation of Juan Nieves, plaintiff's decedent in the underlying wrongful death matter.

4. Federal Rule of Civil Procedure 45(d)(3)(a) states in relevant part: "…On timely Motion, the court for the district where compliance is required must quash or modify a subpoena that…(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden."

5. Since the deposition of Mr. Fischer is noticed to take place in this jurisdiction (*i.e.*, Eastern District of Missouri), this Court has jurisdiction over this Motion to Quash under Federal Rule of Civil Procedure 45(d)(3)(a).

Background Facts

6. James E. Fischer is an attorney specializing in immigration law with offices located in Clayton, Missouri.

7. Juan Nieves was a former client of James E. Fischer who had retained Mr. Fischer as an attorney to advise and represent him with respect to immigration matters.

8. On or about April 8, 2014, Juan Nieves was killed in an accident while working as a longshoreman in Hickman, Arkansas.

9. As a result of the aforementioned accident, a wrongful death lawsuit was brought by Mr. Nieves' wife, Kassandra Nieves, against several named defendants in the U.S. District Court for the Eastern District of Arkansas entitled, *Kassandra Nieves v. Logistical Services, et. al* (Cause No. 3:15 CV 350-JLH).

10. In November 2016, Richard Salloum, an attorney representing one of the defendants in the wrongful death matter, issued a subpoena duces tecum to the Law Offices of James E. Fischer seeking certain non-privileged documents regarding Mr. Fischer's representation of Juan Nieves. See, **EXHIBIT B** attached.

11. James E. Fischer initially objected to the production of any documents from his file citing concerns of attorney/client confidentiality embodied by Rule 4-1.6 of the Missouri Rules of Professional Conduct. See, **EXHIBIT C** attached.

12. Ultimately, a Motion to Compel was filed in the U.S. District Court for the Eastern District of Missouri (Case No. 4:16-mc-00686 CDP) and Judge Catherine Perry issued an Order (Doc. 6) on December 16, 2016, requiring James E. Fischer to comply with the subpoena by producing the requested non-privileged material in his file. See, **EXHIBIT D** attached.

13. James E. Fischer subsequently complied with the subpoena duces tecum by producing to Mr. Salloum the requested non-privileged documents in his file.

14. On March 22, 2017, Donald Radcliff, an attorney representing one of the other defendants in the wrongful death matter, contacted the undersigned counsel for James E. Fischer and indicated his desire to depose Mr. Fischer with respect to Mr. Fischer's representation of Juan Nieves. The subpoena required Mr. Fischer to produce at the time of his deposition: "The entire contents of your file on this case with the exception of any documents that are protected from disclosure by Federal Rule of Civil Procedure." See, Deposition Subpoena attached as **EXHIBIT A**.

15. Counsel for Mr. Fischer has engaged in a telephonic "meet and confer" conference with Mr. Radcliff to express his objection to the taking of Mr. Fischer's deposition on the basis that that all non-privileged documents in Mr. Fischer's legal file have already been produced and that any issues on which Mr. Fischer may be asked to testify concerning his representation of Juan Nieves would be privileged attorney/client communication. Efforts to resolve this conflict have been unsuccessful.

Law and Argument

16. As a result of Mr. Fischer's and Mr. Nieves' attorney-client relationship, any and all knowledge Mr. Fischer has regarding Mr. Nieves and their communications is protected from disclosure.

17. This Court has addressed the issue of attorney-client privilege in the recent past: "In Missouri, the attorney-client privilege has been statutorily codified [ ] and the privilege 'protects any professionally-oriented communication between attorney and client regardless of whether it is made in anticipation of litigation or for preparation for trial.' [ ] The Missouri statute has been construed to be declaratory of the common law rule, and the attorney-client privilege is to be construed broadly to encourage its fundamental policy of encouraging uninhibited communication between the client and his attorney.[ ]" *Pemberton v. Republic Services*, 308 F.R.D 195; 2015 U.S. Dist. Lexis 81063 (U.S. Dist. Ct. E.D. of Mo. 2015) [internal citations omitted].

18. The Missouri Rules of Professional Conduct further explicitly prohibit a lawyer from disclosing information relating to his representation of a client. Specifically, Rule 4-1.6 states in relevant part as follows:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by Rule 4-1.6(b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) To prevent death or substantial bodily harm that is reasonably certain to occur;
>
> (2) To secure legal advice about the lawyer's compliance with these Rules;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client is involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) To comply with other law or a court order.

Missouri Rules of Professional Conduct 4-1.6

19. Juan Nieves' subsequent death does not alter the analysis as attorney-client privilege survives the death of the client. *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (Sup. Ct. 1998).

20. It is believed that the defendants' interest in Mr. Fischer's testimony is centered on whether or not Mr. Nieves, a Mexican national, was legally in the United States at the time of his death. See, Cooper Marine & Timberlands Corporation's Opposition to Plaintiff's Motion to Quash attached as **EXHIBIT E.**[1]

21. While Mr. Fischer *may* have information that is relevant and/or germane to the underlying lawsuit, that does not trump the fact that an attorney-client relationship existed between Juan Nieves and attorney James E. Fischer and all privileged communication relating to Mr. Fischer's representation of Mr. Nieves in the immigration matter are not discoverable "even if the opposing party can show a substantial need for them and establish that it would suffer undue hardship in acquiring their substantial equivalent." *Pemberton* at 12.

22. An attorney's duty of confidentiality is much broader than simply the words a client tells him or the written communication they exchange. The comments to Rule 4-1.6 state, "The confidentiality rule [ ] not only applies to matters communicated in confidence by the client, but also *to all information relating to the representation, whatever its source*. A lawyer

[1] This pleading was filed in the U.S. Dist. Ct. for the E.D. of Arkansas in response to a Motion to Quash and/or for Protective Order filed on behalf of the plaintiff in the underlying matter.

may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." [emphasis added] *Comments to Rules of Professional Conduct 4-1.6[3]*.

23. Consequently, even seemingly innocuous questions such as, when Mr. Nieves first consulted with Mr. Fischer or whether and how much Mr. Fischer was paid for his professional services are related to the representation and, therefore, are subject to attorney-client confidentiality.

24. In summary, attorney James E. Fischer has no stake in the underlying civil lawsuit pending in Arkansas; however, he does have a professional and ethical obligation to the legal profession as well to all of his clients past, present and future that information he gains through the representation of his clients will not be used to the client's ultimate detriment. It would be an unfair burden placed upon Mr. Fischer to require him to sit for a deposition in which he can offer no meaningful testimony due to attorney-client privilege protections.

25. For the reasons stated herein, the deposition notice of James E. Fischer should be quashed and James E. Fischer should not be compelled to offer testimony in this matter.

26. In the alternative, if the Court should decide that the deposition of James E. Fischer should be allowed to go forward, the petitioner requests that a Magistrate be assigned and available by phone at the time of the deposition to address any objections based upon attorney-client privilege as they may arise during the deposition.

WHEREFORE, petitioner, James E. Fischer, moves the Court to quash the deposition notice of James E. Fischer and for such further relief as the Court deems just and proper.

FOX GALVIN, LLC

By: /s/ Michael E. Donelson

Michael E. Donelson, #51755
One South Memorial Drive, 12th Floor
St. Louis, MO 63102
(314) 588-7000
(314) 588-1965 (fax)
mdonelson@foxgalvin.com

Attorneys for Petitioner, James E. Fischer

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed via the Court's electronic filing system, this 6th day of April 2017, with notification to the following counsel of record, by U.S. First Class Mail:

Mr. Donald C. Radcliff
Brady Radcliff & Brown, LLP
61 Saint Joseph Street
Suite 16500
Mobile, AL 36602

Mr. George R. Wise, Jr.
Mr. Lloyd W. "Tre" Kitchens, III
Brad Hendricks Law Firm
500 Pleasant Valley Drive
Suite C
Little Rock, AR 72227

Mr. Andre J. Mouledoux
Mr. Dan Hoerner
Mouledoux Bland LeGrand & Bracket
701 Poydras Street
Suite 4250
New Orleans, LA 70139

Mr. Gordon S. Rather, Jr.
Wright Lindsey & Jennings
200 West Capitol Avenue
Suite 2300
Little Rock, AR 7201-3699

Mr. John G. Simon
Mr. Timothy M. Cronin
Ms. Erica F. Blume
Mr. John M. Simon
The Simon Law Firm, P.C.
800 Market Street
Suite 1700
St. Louis, MO 63101

Mr. Thomas P. Diaz
Liskoe & Lewis
One Shell Square
701 Poydras Street
Suite 500
New Orleans, LA 70139

Mr. Philip Bohrer
Bohrer Law Firm, LLC
3414 Magic Oak Lane
Sarasota, FL 34232

Mr. Gregory W. O'Neal
576 Oakleaf Office Lane
Suite 200
Memphis, TN 38117-4863

Mr. Richard P. Salloum
Mr. Nathan L. Burro
Franke & Salloum
10071 Lorraine Road
Gulfport, MS 39503

Mr. Guy Alton Wade
Friday Eldredge & Clark
400 West Capitol Avenue
Suite 2000
Little Rock, AR 72201

Mr. Daniel L. Massey
The Massey Law Firm, LLC
Two City Place Drive
Suite 200
St. Louis, MO 63141

Mr. Myles D. McDonnell
McDonnell & McDonnell
231 South Bemiston Avenue
Suite 800
St. Louis, MO 63105

Mr. Brent L. Probinsky
Brent Probinsky, P.A.
3414 Magic Oak Lane
Sarasota, FL 34232

/s/ Michael E. Donelson